Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1996

DONALD A. SLATHAR,

Petitioner,

vs.

SATHER TRUCKING CORPORATION, AN IOWA CORPORATION; SATHER'S INC., A DELAWARE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it reversible error to reassert the employer's McDonnell-Douglas' presumptions into the jury's instructions?

2. Whether the exclusion of testimony from an informed non-decisionmaker who warned a decisionmaker about the legality of Mr. Slathar's pending discharge, reversible error?

3. As an alternative issue to question number 1, if McDonnell-Douglas instructions are to be used, did the lower court err by misapplying *Hazen Paper*?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit. [Supreme Court Rule 14.1(b)].

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
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DONALD A. SLATHAR,

Petitioner,

vs.

SATHER TRUCKING CORPORATION, AN IOWA CORPORATION; SATHER'S, INC., A DELAWARE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Donald A. Slathar, (hereinafter "Slathar") respectfully petitions that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered March 15, 1996, affirming the trial court's denial of a motion for a new trial. A petition for rehearing with a suggestion for rehearing en banc was denied on April 25, 1996.

STATEMENT OF JURISDICTION

Certiorari is sought under Rule 10 and 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the Eighth Circuit entered March 15, 1996. A petition for rehearing with a suggestion for rehearing en banc was denied on April 25, 1996.

THE STATUTE AT ISSUE

It shall be unlawful for an employer--

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms. conditions, or privileges of employment, because of such individual's age[.]" 29 U.S.C. § 623(1).

STATEMENT OF THE CASE

Procedural history.

A jury trial was held on January 3, 4, 5, 6, 9, and 10, 1995. Appropriate offers and objections were made to these instructions at issue on petition. Slathar's motion for a new trial was made denied on March 9, 1995. Petitioner appealed under 28 U.S.C. §§ 1291 and 1294(1) and the circuit court affirmed. Pet. Appx. A1. His petition for rehearing with a suggestion for rehearing en banc was denied on April 25, 1996. *Ibid.*

Facts.

Petitioner acknowledges the appeals court and the trial court presented the factual issues well. Pet. Appx. 1-10.[1] A brief summary here will show reasons why the excluded testimony of the human resource professional, Ms. Anita Darnell, was reversible error.

Sathers, Inc., acquired a business known as Powell's Candies, Inc., in November, 1992. Sathers claimed that on or about January 28, 1994, they decided to "eliminate" the position of Mr. Donald Slathar.

Petitioner a well-qualified individual with over 30 years in the maintenance, acquisition, and design of confectionery business machines. His base salary was $84,000, and, due to his performance, he received over $20,000 in bonuses on his 1991 W-2 from. Pl's Trial Ex. 14.[2] Mr. Robert Fraser, the former chairman of Powell's, testified that Mr. Slathar's primary skill was in maintaining a positive equilibrium between those persons who operated the machines and the maintenance personnel who maintained them. Trans, p. 197-98.[3] That primary skill coupled with Mr. Slathar's experience saved Powell's candy over $500,000 annually, far more than enough to cover Mr. Slathar's salary. *Ibid*, p. 196.

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1 "Pet. Appx. refers to the appendix attached to this petition.

2 This abbreviation refers to Plaintiff's trial exhibit numbered 14. This item and other similar ones, such as exhibits and the transcript, cited in this petition can be reproduced later, under Rule 26.

3 "Trans." refers to the trial transcript

When Mr. Slathar gained knowledge that his position was eliminated, he questioned the decision by telling Mr. Lindborg, the general manager at Powells, that the plant needed someone like him to maintain it. Trans. 27. Sure enough Sathers planned for two to three people to fill his position; a maintenance supervisor, a manufacturing supervisor, and a general foreman. *Ibid*, at 471-472, 855. Mr. Slathar's duties were assumed by persons under forty who made less than he. Some of his duties, were assumed by Rick Vos, who was promoted into this position, a Michael Thorsen, hired in as a new maintenance supervisor, and Mr. David Thompson, who took over some of Mr. Slathar's plant performance analysis. *Ibid*, 31-33, 158-160, 268 & 293. Messers. Vos and Thompson were both in their thirties and received about $35,000 in an annual salary.[4] Sathers additionally engaged the services of two to three independent contractors to perform the work Mr. Slathar had managed for Sathers. These contractors included Beckers of Minneapolis, Minnesota, Southern Enterprises, in Baton Rouge, Louisiana, and a firm from Japan. *Ibid*, at 172, 500, & 544.

An immediate and, at the time, mutually exclusive reaction was made to Sathers January 28, 1992, decision to terminated Slathar, by Ms. Anita Darnell, the human resource manager for Sathers' Powells facility. Pet. Appx. 12-13. Her reaction and explicit warning with a decsionmaker was excluded from the jury. *Ibid.* One such conversation was relayed to one of the persons, Mr. Douglas Pendgraft, admittedly involved in the decision to terminate Mr. Slathar.

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[4] Mr. Vos received a quick raise in August, 1992 to $40,000. Mr. Thompson had more plants to analyze than the Powells facility. Still Mr. Slathar possessed those skills.

She told her boss Mr. Pendgraft that she saw the decision as risky under the age and disability discrimination laws.[5] *Ibid.* Ms. Darnell had eighteen years of experience as a human resource professional who saw the decision as very poor. Pet. Appx. 12.

The impact of this excluded testimony when added to the her allowed testimony would have placed the issue of an illegal motivation and pretext squarely in the jurors' minds. Slathar understands *Hicks* to state that this is the issue to be resolved. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2749 (1983). Ms. Darnell was allowed to testify that she observed Mr. Vos performing many of Mr. Slathar's former duties. Trans. 243-244.

Slathar ought to have been able to relate Ms. Darnell's initial reaction to the termination decision to her observation of what Mr. Slathar's replacement performed, through evidence and argument. Correlating her "risky" observations with her 'admitted' testimony she could have explained that saw the representation that Mr. Donald Slathar's position as eliminated was highly questionable, since the services he performed were needed within the plant. Pet. Appx p. 12-13.

The appeals court focused too narrowly on Sathers' first decision to terminate Mr. Slathar. Pet. Appx. 7. At least two decisions were made one near January 31, 1992, and the other when Sathers decided to ignore Ms. Darnell's advice and continue on with the actually termination on March 27, 1992. Within this two month period, Sathers placed Mr. Vos into his new job, changed the job descriptions of Michael

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[5] Mr. Pendgraf was one of the four persons who made the decision to terminate Mr. Donald Slathar.

Thorsen and Rick Bolnick, began to advertise for the position ultimately filled by David Thompson. One reason another executive gave to the committee who made the decision to terminate Mr. Slathar, was that he was overly qualified. Trans. 454.

Plaintiff sued for age discrimination and Sathers defendant that the decision was a part of its reduction in force.

At the charge conference Slathar objected to the 'business judgment' instructions, based on the same reasoning that supports the *Hicks*, decision. Trans. 678. Senior District Judge Donald D. Alsop overruled Slathar's objection. The following instructions were then given:

> "The progression of age is a universal process. Thus, it is apparent that in the usual case, older workers are constantly moving out of the labor market while younger workers come in. Thus, there is not an automatic presumption of discrimination where a younger worker replaces an older one.
>
> "When an employer's decision is wholly motivated by factors other than age, there is no discrimination. This is even true if the factor motivating the decision to terminate is typically correlated with age; such as pension status, salary, or seniority. The *ADEA* does not make it illegal to terminated an employee simply because he is Paid a high salary.
>
> "An employer is not required to reassign employees whose jobs are eliminated or put

employees in a lower echelon, poorer paying jobs with substantial reductions in responsibilities and salary. The issue is ultimately whether the {sic} age was a determining factor in he decision to discharge the employee, in this case Donald Slathar.

"You are instructed that the focus of your consideration must be upon Sathers' motivation, and not on your own consideration of Sathers' business judgment regarding the organization changes that they made. The issue is whether or not Sathers discriminated against Mr. Slathar because of his age." Pet. Appx. 13.

Slathar also argued that the instruction was in the negative, it down played commonly relied upon circumstantial evidence. Judge Alsop then suggested Plaintiff develop affirmative instructions. Plaintiff then offered the following instructions:

"if you f[ind] Don Slathar's was discharged because of his pay, you may consider his pay is tied to his experience and age." Pet. Appx. 14.

The trial court rejected this proffered instruction by ruling that *Hazen Paper* authorized the exclusion. After about two days of deliberations the jury return a defendant's verdict.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's application of this Court's decision in *St. Mary's Honor Center vs. Hicks*, 509 U.S. 502, 506, 510. 113 S.Ct. 2742, 2749 (1993), to the jury instructions conflicts with:

1. The *Hicks'* decision regarding when the McDonnell-Douglas presumptions or procedural burdens cease, and,
2. Other courts' decisions regarding whether to instruct a jury after *Hicks*, regarding the procedural burdens. Rules 10 (a) and 10 (c).

Slathar, conflicts with the principles established in *Hicks*, concerning when the procedural burdens cease in discrimination cases. It is likely that this important federal issue will recur unless it is addressed and decided by this Court, which has not been previously decided. *Slathar*, also conflicts with *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989), holding that it was err to reassert the defendant's burden (there, the plaintiff was not as skilled as his replacement) into the jury instructions.

The Eighth Circuit's holding in *Slathar*, directly conflicts with the Seventh Circuit's holding in *Gehring v. Case Corporation*, 43 F.3d 340, 346 (7th Cir. 1994), cert. denied 115 S.Ct. 2612 (1995). In *Gehring v. Case Corporation*, that court affirmed the trial court's decision **not** to give a McDonnell-Douglas, burden-shifting instruction. In reasoning, the same upon which Mr. Slathar stated to the trial court (Trans. p. 678), the Seventh Circuit ruled:

> "The judge declined, for the very good reason that the Supreme Court has held that this burden shifting model applies to pretrial proceedings, not to the jury's evaluation of the evidence." *Gehring*, 45 F.3d p. 343. A reading of the statute, itself, would lend support to this interpretation. Ibid, at 346.

Other federal Circuits have or continue to instruct their juries only on the ultimate issue. *Loeb v. Textron*, 600

F. 2d 1003, 1010 (1st Cir. 1980); ([w]e conclude that the operative principles behind McDonnell Douglas are applicable in age cases as in Title VII cases, but that the McDonnell Douglas formula is not to be read in full to the jurors). *Krodel v. Young*, 748 F.2d 701 (D.C. Cir. 1984); *Cabrera v. Jakabovitz*, 24 F.3d 372, 380 (2nd Cir. 1994); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1137 (4th Cir. 1988); *Blackwell v. Sun, Elec. Corp.*, 696 F.2d 1176, 1180 & n.5 (6th Cir. 1983); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1344 (9th Cir. 1987); and, *Messina v. Kroblin Transportation Systems, Inc.*, 903 F.2d 1306, 1308-09 (10th Cir. 1990).

The state Court of Appeals of Maryland recently rejected another type of presumption-asserted statements in the jury instructions, but on different grounds. *Molesworth v. Brandon, et al.*, 70 FEP 524 (Md. App. 1996). In reversing the state's circuit court the appeals court reasoned that the "same actor inference" was not applicable in that case, because there was direct evidence of discrimination, citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Brandon*, at 527. This state court decision also cites to several federal circuit courts showing that there is a movement among the courts to reassert, at least, the employer's burdens into jury instructions.[6]

With the direct conflict between the Eighth Circuit and this Court, coupled with the different interpretation

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[6] The following circuit courts have approved the use of a jury instruction on the "same actor inference" in *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991). *Buhrmaster v. Overnite Transportation Co.*, 61 F.3d 461 (6th Cir. 1995). *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173 (8th Cir. 1992).

between the competing opinions, cited above, the time is ripe to review this issue.

b. Exclusion of testimony between an informed professional with a decisionmaker, concerning professional's observation that the proposed discharge was questionable.

Some circuit courts, including the Eighth Circuit, have ruled that statements made by the non-decisionmakers are not probative to the issue of pretext or illegal motive. Pet. Appx. 7. *Scrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988). Other circuits have refused to issue such a blanket rule. Infra, 17-18. *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326 (3rd Cir. 1995); and, *Sutera v. Schering Corp.*, 73 F.3d 13 (2nd Cir. 1995).

Slathar, also conflicts with this court's application of the agency principles in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986), employer is responsible for actual or constructive knowledge of its superiors' wrongful conduct. These decisions also conflict with the ultimate issue in *Hicks*. 509 U.S. at 610. Admissibility of material conversations with the decision-makers is the central issue of fact in *Hicks*. Without a direct admission against interest, this type of direct evidence is the closest a discharge employee is offer at a trial.[7] The Eighth Circuit's decision in *Slathar*, represents the contrary view, that unless the testimony is by an actual decision maker, it is not admissible to prove that age was a factor in the decision.

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[7] This Court acknowledged that it would be rare indeed for a there to be an eye-witness to a discriminatory decision. *Hicks*, 113 S.Ct. at 2755, citing Aikens, 460 U.S. at 716.

c. If there is to be McDonnell-Douglas type instructions, then the Eighth Circuit misapplied *Hazen Paper.*

By stating that it was not reversible err to refuse to instruct the jury, that Mr. Slathar's experience, salary, and age can be viewed together as circumstantial evidence of an age-based decision, the Eighth Circuit misapplied *Hazen Paper. Hazen Paper Co., v. Biggins*, 113 S.Ct. 1701, 1707 (1993). The Eighth Circuit's opinion also conflicts with portions of the holding in *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995). *Slathar*, allowed the exclusion of an affirmative jury instruction on the use of specific kinds of circumstantial evidence, by misreading *Hazen Paper* to apply only to inaccurate stereotyping. Pet. Appx. 9-10. *Hazen Paper* ruled that pension vesting requirements can be analytically distinct from an age-based decision. 113 S.Ct. at 1307. Since the employee in *Hazen Paper* presented additional circumstantial evidence that his age was used against him, the case was remanded back to the First Circuit. 113 S.Ct. at 1708.

In *McKennon*, this Court reasoned the ADEA "reflects a societal condemnation of invidious bias in employment decisions ... [that is] part of a wider statutory scheme to protect employees in the workplace nationwide." 115 S.Ct. at 884. By analogy, *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), this Court held that the use of accurate, nonstigmatizing stereotypes violated Title VII. These reasons should be incorporated into ADEA cases.

There is circuit conflict with *Hazen Paper*, and *McKennon*, on this issue. The Seventh and Sixth Circuits hold, essentially, the essence of the ADEA's prohibitions is

based on 'inaccurate stereotyping" and the fact that older workers were likely to have more years of experiences was neither inaccurate or stigmatizing. See, *EEOC v. Francis W. Parker School*, 41 F.3d. 1073, 1075 (7th Cir. 1994), cert. denied, 115 S.Ct. 2577 (1995). See also, *Lyon v. Ohio Education Ass'n & Professional Staff*, 53 F.3d 135 (6th Cir. 1995).

Issues present within this petition will continue to recur unless this Court squarely addresses them by granting the writ.

ARGUMENT

a. Jury instructions.

1. Standard of Review for erroneous jury instructions.

Where an error of law or the omission of a legal standard occurs in the jury instructions, resulting in material or clear error, a new trial has been result of this Court's decisions in many case, including *Patterson v. McLean Credit Union*, 491 U.S. at 180; *Norfolk & Western Railway Co., v. Leipelt*, 444 U.S. 490, 497 (1980); *Memphis Community School District v. Stachura*, 477 U.S. 299, 302 (1986). New trials have been the result of this Court were a jury is instructed to avoid consideration of evidence. *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990).

It is incumbent on this Court to apply the *Hicks*, burden of proof principles to the jury instructions in pretext cases.

2 McDonnell Douglas jury instructions are erroneous under *Hicks*.

This Court made it abundantly clear in *Hicks*, that once each party presents evidence to establish there respective burdens, they drop out of the case, allowing the factfinder to determine whether a motivating reason for the employee's termination was intentional discrimination. *Hicks*, 113 S.Ct. 2749-2750.[8] For this Court's understanding to reach juries across this nation, it must grant this petition to review the Eighth Circuit's decision.

A direct conflict in reasoning, but in a different type of discrimination case, the court need only look to *Patterson*, 491 U.S. 188. Circuit courts are straying from this simple holding by reasserting presumptions into jury instructions. Direction from this Court is warranted to resolve these issues and this case on petition squarely presents the questions for review.

Below the trial court reasserted the defendant's procedural burden into the jury instructions and down played commonly used items of circumstantial, materially misstated the law. Pet. Appx. 13. Sathers asked for and received a presumption of validity by the trial judge to its 'business judgment' decision. *Ibid.* Under *Hicks*, that presumption ceased to exist after defendant's motion for summary judgment and judgment as a matter of law were denied. 113

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[8] This Court has never decided whether the McDonnell-Douglas framework applies to cases arising under the ADEA. *O'Connor v. Consoldiated Coin Caterers Corporation*, 1996 U.S. Lexis 2168, at 5 (1996) citing, *Hicks*, 509 U.S. at 506 n.1.

S.Ct. 2753-54, applying *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). For the trial court to reassert it at the instruction phase of the trial demonstrates a direct conflict with this Court's holding in *Hicks*.

Federal Circuit courts should adopt *Hicks*, as reemphazied in *Gehring v. Case Corporation*, 43 F.3d at 346 340. The Seventh Circuit ruled:

> "The judge declined, for the very good reason that the Supreme Court has held that this burden shifting model applies to pretrial proceedings, not to the jury's evaluation of the evidence.' *Gehring*, 45 F.3d p. 343. A reading of the statute, itself, would lend support to this interpretation. " *Ibid.*

In *Slathar*, the Eighth Circuit held that McDonnell-Douglas based instructions should be used. Pet. Appx. 5-6.

The Eighth Circuit originally said that it was unnecessary and inadvisable to instruct the jury regarding the three-step analysis of McDonnell Douglas. *Manual of Model Jury Instructions for the District Courts of the Eighth Circuit* (September, 1992), citing, *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 799 F.2d 18, 20 (8th Cir. 1985). See Pet. Appx. 14. The change came with *Walker v. AT & T Technologies*, 995 F.2d 846, 849 (8th Cir. 1993); which held that a far less controversial business necessity instruction

must be given.[9] Judge Gibson, who wrote the opinion, stated that business necessity was a substantive issue. See, 995 F.2d at 849 (wherein he wrote "[t]hus we conclude that A T & T had the right to have the jury instructed as to this principle of substantive law, particularly on the record before us." *Ibid.* The opinion in *Walker* was issued ten (10) days before this Court's decision in *Hicks.*

Judge Gibson is still partially correct that the issue is substantive, but it is only for the court, after *Hicks,* and not the jury. *Hicks*, 113 S.Ct. at 2753, 2756.

In *Slathar,* the jury was further instructed that certain types of circumstantial evidence was not to be considered in their deliberations, when the court said:

> "When an employer's decision is wholly motivated by factors other than age, there is no discrimination. This is even true if the factor motivating the decision to terminate is typically correlated with age; such as pension status, salary, or seniority. Pet Appx. 13.

It is well-settled under this Court's opinion in *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714, n.3, (1983), that the plaintiff in a Title VII case may

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[9] The *Walker,* instructed: "[t]he ADEA is not intended as a vehicle for judicial review of employment decisions which are not brought about by reason of age or age bias. The law protects older employees from being treated more harshly then they would have been if they were young. However, an employer does have a right to make business decisions – to assign work, to change and employee's duties, to transfer, demote or discharge an employee for good reason or no reason at all, absent intentional age discrimination." *Walker*, 995 F.2d at 849.

satisfy their ultimate burden of persuasion by presenting nothing more than circumstantial evidence. The *Slathar,* court's instructions, confused a reasonable jury into thinking that an employer's decision, viewed through common items of circumstantial evidence, such as, age, salary, experience, seniority, or pension status, is not evidence of an illegal motivation. The trial court misapplied *Hazen Paper Co., v. Biggins*, 507 U.S. 604, 613, 113 S.Ct. 1701, 1707-8 (1993), for that decision held that pension status and other factors may combine to create an issue of fact for trial. *Ibid,* at 1708. As the *Hazen Paper,* court stated:

> "Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age.' *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly. *Hazen Paper,* 507 U.S. at 610.

For reasons inapposite to those stated in *Hazen Paper,* and *Criswell*, Sathers terminated Mr. Slathar since he was a very productive employee, who had earned and maintained his usefulness with his employer, so that he achieved his salary and position. The fact that Sathers replaced Petitioner with four to five people, plus subcontractors, speaks loudly that Mr. Slathar's age and experience as a fully productive employee, was used against him to justify his termination. The Second Circuit has held that " the ADEA commands that 'employers are to evaluate once an employer stigmatizes the discharged employee's abilities as too good,' such motivation correlates with age." *Taggart v. Time, Inc.*, 924 F.2d 43, 47-48 (2nd Cir. 1991) (employer's assertion that 59 year old former employee of

dissolved subsidiary was overqualified for position that was given to 41 year old person, was evidence of a pretext). Since Mr. Slathar was also not allowed the opportunity to work any of the 'new' positions created by Sathers, such may be evidence of discrimination. *Hall v. Western Products, Co.*, 988 F.2d 1050 (10th Cir. 1993), [when a party is not offered any of the new positions created, that can be consider evidence of discrimination].

The trial court's reassertion of the defendant's presumption into the jury instruction, materially misstated the law at the point in the litigation, by prejudicing the employee with an instruction that negated their deliberation away from much of the circumstantial proof going to the ultimate issue of motivation.

For these reasons, especially the direct conflicts with this Court, Mr. Slathar asks this Court to grant his petition.

b. Admissibility of evidence showing intentional knowledge.

1. Standard of Review.

New trials have been the result of this court were a jury does not hear certain evidence or is instructed to avoid consideration of evidence. *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990). This Court has held that review of legal errors is to be conducted de novo, under the abuse of discretion standard. *Icicle Seafoods, Inc., v. Worthington*, 106 S.Ct. 1527, 1530 (1986); (where factual findings assailable, but an erroneous view of the law occurs, the appellate court should reverse the district court on an abuse of discretion standard of review. Errors in the

introduction, exclusion or evaluation of evidence or fact, are reversible when they influence errors of law. *Aikens*, 460 U.S. at 716. *Hazen Paper*, 510 U.S. at 610.

2. Review should be granted.

The *Slathar* appellate court ruled the trial was within its discretion to exclude the evidence of Ms. Darnell's conversations with the Director of Human Resources and the President of Sather's Powells facility. Pet. Appx. 7.

We ask this court to review these ruling, ordinarily left to the discretion of the trial judge, for it is err to exclude evidence offered for the purpose of establishing the illegal motivation. To hold otherwise, prevents a party from proving their case, with prejudicial evidence. Under *Hicks*, after the presumptions are rebutted, the "issue for the factfinder is intent". *Hicks*, 113 S.Ct. at 2749. These presumptions drop out of the case. *Ibid*, at 2747, *Burdine*, 450 U.S. at 254-55.

The *Slathar*, decision conflicts, in principle, with another decision from the same circuit that reversed a judgment based on a jury verdict, when similar evidence was lacking. In *Nelson v. J. C. Penney Company, Inc.*, 75 F.3d 343 (8th Cir. 1996), because there was no evidence to establish pretext or a discriminatory motive.

The Third Circuit in *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326 (3rd Cir. 1995), reversed a trial court's grant of summary judgment. The court held, in part, that the CEO causally unrelated remarks, in a company newsletter about "star" "young" men who were the company's future, was probative to the issue of the company's culture circumstantially showing an anti-age bias.

The Sixth Circuit in *Wells v. New Cherokee Corp.*, 58 F.3d 233, 238 (6th Cir, 1995), held that testimony from a non-decision maker stated that this plaintiff was terminated due to her age was fully admissible. The Wells, court stated:

> "courts must consider as probative evidence any statements made by those individuals who are in fact meaningfully involved in the decision to terminate an employee." *Ibid.*

While the appeal was taken from a refusal to instruct the jury on how to treat such, this case points to the importance of having such evidence when prosecuting an age-based case. It also appears to be a departure of the Sixth Circuit's holding in *Schrand v. Federal Pac. Elec. Co.*, relied upon by the *Slathar*, court. Pet. Appx. 7.

The Second Circuit held in *Sutera v. Schering Corp.*, 73 F.3d 13 (2nd Cir. 1995), that evidence of harassing and demeaning reference to his age was evidence of pretext, in reversing a trial court's grant of summary judgment.

Combining the use of McDonnell-Douglas instructions and the exclusion of Anita Darnell's testimony also shows a disparity with *Hicks*, in that the issue for the jury is whether the illegal motive played a determining factor in the employer's decision. 113 S.Ct. at 2749, 2756. Excluding the evidence shows that the Eighth Circuit still misunderstands such evidence as not going to the material issue of the case. Put another way, the issue as framed by the Eighth Circuit is more focused on the employer's stated reason, rather then (as it should be) on whether an illegal motive played a motivating

factor in the decision.[10] Several circuits have adopted this testimonial evidence as critical to the resolution of age discrimination. The trial court excluded this evidence. It found the probative value outweighed by the prejudicial impact of the statements, under Rule 403. While all concerned admits that Sather's first decision was to **inform** Mr. Slathar that he **would be** terminated in late January, 1992, he was not **actually terminated** until March 27, 1992. Sathers had two months in which to review their decision, in light of Ms. Darnell's warning. Pet. Appx. 12. Motivated by Mr. Slathar's age, Sathers ignored Ms. Darnell and replaced Mr. Slathar with at least two to three younger individuals, whose combined salaries were close to what Petitioner made.[11]

Petitioner concedes that Ms. Darnell's excluded testimony would have been damaging and, therefore, prejudicial to Sathers. So the issue is whether the trial court's exclusion, that its prejudicial impact outweighed the probative value, was clearly erroneous. The Second, Third, and Fourth Circuits have reversed trial courts that excluded similar evidence. The Eighth Circuit has reversed judgments entered upon a jury verdict, for the absence of such information.

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[10] The Eighth Circuit's decision in *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th. Cir. 1992), held that since the employer's stated reason was found to be a pretextual, judgment must be entered for the employee. It then reversed a trial court's finding for the employer. This Court then reversed the Eighth Circuit's decsion in *Hicks*, stating the factfinder's rejection of the employers will permit, but not require the trier of fact to infer the ultimate fact of intentional discrimination. 113 S.Ct. at 2749.

[11] The jury should have heard the evidence, as argued above, before deliberating for two days.

Nelson v. J. C. Penney Company, Inc., 75 F.3d 343, pet. reh. denied (8th Cir. 1996).

Mr. Slathar asks the Court to grant this petition and issue the writ to the Eighth Circuit to address the exclusion of this very probative evidence under *Hicks*, and *Hazen Paper*.

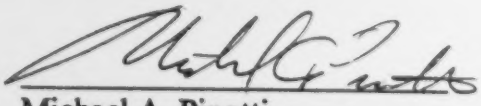
c. Instructing the jury on the inapplicability of circumstantial evidence in a discrimination case.

It is our view that McDonnell-Douglas based instructions are erroneous, so this issue is in the alternative to Question 1. Petitioner, alternatively, seeks review based on arguments already stated herein.

CONCLUSION

Mr. Slathar petitions this court to grant a writ of certiorari to the Eighth Circuit Court of Appeals to review these questions that are at the cornerstone of how ADEA jury trials will be conducted, after *Hicks*, and *Hazen Paper*.

Respectfully Submitted,



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APPENDIX

ORDER DENYING PETITIONER'S DONALD A. SLATHAR'S PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC

THE PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC BY DONALD A. SLATHAR IS HEREBY

DENIED, APRIL 25, 1996.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-1864
No. 95-2003

Donald A. Slathar,

Appellant/Cross-Appellee,

v.

Appeals from the United States District Court for the District of Minnesota

Sather Trucking Corporation, an Iowa corporation; Sather's, Inc., a Delaware corporation,

Appellee/Cross-Appellant.

Submitted: December 13, 1995

Filed: March 15, 1996

Before McMILLIAN, JOHN R. GIBSON, and BEAM, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Donald Slathar appeals the judgment entered following an adverse jury verdict in his Age Discrimination in Employment Act claim, 29 U.S.C. §§ 621-634 (1994), alleging he was wrongfully terminated because of his age. Slathar argues that the district court[1] erred by (1) instructing the jury on business judgment, (2) not allowing a former Sather's human resource manager to testify, and (3) refusing to strike part of the company's closing argument. We affirm.

[- 1-]

Slathar was born in January 1935. He began working for Powell's Candies, Inc., a candy manufacturer, in 1976. Slathar's duties included supervising maintenance in the facility, keeping the equipment running, designing equipment, and plant engineering.

In November 1991, Sather's purchased the Powell's facility. Shortly thereafter, the company began restructuring

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[1] The Honorable Donald D. Alsop, Senior Judge, United States District Court for the District of Minnesota.

the Powell's organization to more closely reflect Sather's organizational structure. Powell's maintenance department had always designed and built equipment in-house. In contrast, Sather's policy was to purchase equipment on the open market.

In January 1992, Sather's informed Slathar that he was being terminated in March. The company claimed Slathar's position as a design engineer was no longer needed, and his position was being eliminated. Slathar believed he was being fired because of his age, and replaced as maintenance supervisor by Ricky Vos, a Sather's employee in his thirties, who was transferred to the former Powell's facility to serve as Maintenance General Foreman.

Slathar sued Sather's. Following the pre-trial conference the district court dismissed Sather Trucking as a defendant and dismissed Slathar's tortious interference claim. The jury returned a special verdict on Slathar's Age Discrimination in Employment Act claim, finding that Slathar's age was not a determining factor in the company's decision to discharge Slathar. Based on the verdict, the district court made a finding of fact in Slathar's Minnesota age discrimination claim that the company did not discriminate against Slathar on the basis of age. The court entered judgment against Slathar and he appeals.

[- 2-]

I. Slathar argues that the district court erred by instructing the jury on business judgment. He contends this instruction increased his burden of proof and materially misstated the law. He also argues that it was error to refuse to instruct the jury that if it found he was discharged because of his pay, they could consider that his pay was tied to his experience and age.

The district court instructed the jury that they must find for Slathar if age was a determining factor in his termination, and age is a determining factor only if the company would not have terminated Slathar but for his age.

The court went on to instruct that an employer has the right to make business decisions, absent intentional age discrimination, "even if the factor motivating the decision to terminate is typically correlated with age; such as pension status, salary or seniority." The court submitted special interrogatories to the jury, and the jury specifically found that age was not a determining factor in Slathar's discharge.

"We review the district court's formulation of jury instructions for abuse of discretion. We must determine whether the jury instructions, taken as a whole, fairly and adequately submitted the issues in the case to the jury." *Transport Ins. Co. v. Chrysler Corp.*, 71 F.3d 720, 723 (8th Cir. 1995) (citations and internal quotations omitted). "[T]he form and language of jury instructions are committed to the sound discretion of the district court so long as the jury is correctly instructed on the substantive issues in the case." *Walker v. AT & T Technologies*, 995 F.2d 846, 849 (8th Cir. 1993) (quoting *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir.), cert. denied, 506 U.S. 1014 (1992)).

"The ADEA is not intended to be used as a means of reviewing the propriety of a business decision." *Gaworski v. ITT Commercial*

[- 3-]

Fin. Corp., 17 F.3d 1104, 1110 (8th Cir.), (quoting *Jorgensen v. Modern Woodmen of Am.*, 761 F.2d 502, 505 (8th Cir. 1985)), cert. denied, 115 S. Ct. 355 (1994). In Walker, 995 F.2d at 849, we held that, on the record there before us, the employer was entitled to have the jury instructed "that an employer may exercise business judgment in making personnel decisions." An employer has the right to make business decisions, so long as they are made in a nondiscriminatory manner. See, *Walker*, 995 F.2d at 849-50.

Even if Slathar was terminated because of his high salary, age discrimination cannot necessarily be inferred. See

Bialas v. Greyhound Lines, 59 F.3d 759, 763 (8th Cir. 1995). Slathar's "status as an experienced and thus higher paid employee [ ] does not in itself permit an inference of age discrimination." *Serben v. Inter-City Mfg. Co.*, 36 F.3d 765, 766 (8th Cir. 1994) (per curiam), cert. denied, 115 S. Ct. 1402 (1995). Age discrimination may exist when an employer terminates an employee based on a factor such as experience or salary when the employer presupposes a correlation with age and uses that factor as a proxy for age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612-13 (1993). However, a decision to terminate an employee solely because of salary or length of service is not age discrimination. *Ibid.* at 611. Age and these other factors are analytically distinct. *Ibid.*

Relying on *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), Slathar argues that the court's instruction confused the substantive issues that the jury was supposed to decide, somehow injecting procedural issues into the jury's decision and effectively increasing his burden of proof. *St. Mary's Honor Center*, 113 S. Ct. at 2746, was a Title VII case tried to the court. The Court's discussion of McDonnell Douglas burden shifting offers no support for Slathar's argument. Reading the instructions as a whole, it is evident that the jury's consideration was directed to whether age was the determining factor in the decision to discharge Slathar, and Slathar had the burden of proving that he

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was discharged because of his age. While the instruction dealt with business judgment, pension status, salary, and seniority, the instruction plainly stated the ultimate issue for the jury's determination. See *Walker*, 995 F.2d at 849; *Hazen Paper Co.*, 507 U.S. at 611-613. The district court did not abuse its discretion by giving the proffered instruction.

Furthermore, the district court did not abuse its discretion by refusing to instruct the jury that if it found that

Slathar was discharged because of his pay, it could consider that his pay is tied to his experience and age. In proposing this instruction, Slathar misconstrues the Court's statement in *Hazen Paper Co.*, 507 U.S. at 612-13, which noted that age discrimination may exist when an employer uses another factor as a proxy for age. The Age Discrimination in Employment Act requires that an employer not discriminate based on age. It does not require an employer to ignore an employee's other characteristics. The ultimate test is whether the company discriminated against Slathar because of his age, and the district court properly instructed the jury on this question.

II. Slathar next argues that the district court should have admitted the testimony of Anita Darnell, a former human resources manager at Sather's, regarding a phone conversation she had with Douglas Pendgraft, the Sather's Corporate Director of Personnel. Darnell said that she did not participate in the decision to terminate Slathar. Upon learning that Slathar had been terminated, Darnell telephoned Pendgraft and informed him that she believed terminating Slathar was a risky decision because Slathar was in a protected group based on his age and perhaps his disability. Pendgraft responded "that Sather's would take care of it."

[-5-]

The district court refused to allow Darnell's testimony on this subject, finding it was irrelevant under Federal Rule of Evidence 401 because Darnell had not participated in the employment decision, the conversation took place after the decision to terminate Slathar had been made, and it amounted to nothing more than her opinion regarding the company's potential exposure. Further, the court found that the value of the proposed testimony was far outweighed by its prejudicial impact. See Fed. R. Evid. 403.

"Admission of Evidence is a matter for the district court's discretion and we will defer to the district court's

ruling absent an abuse of discretion." *Morgan v. Arkansas Gazette*, 897 F.2d 945, 952 (8th Cir. 1990). Stray remarks and statements by nondecisionmakers are not direct Evidence of discriminatory motive. See *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991). Darnell's testimony that she told a senior manager that Slathar was in a protected class is not evidence of discrimination. See *Bashara v. Black Hills Corp.*, 26 F.3d 820, 823-24 (8th Cir. 1994) (holding that human resources manager's expression of concern over possible age discrimination claim was the "equivalent of a stray remark" and did "not constitute evidence of discriminatory animus").

Darnell was not involved in the decision to terminate Slathar, and she Did not offer her opinion of the decision until after it had been made. Pendgraft's response is much too ambiguous to be considered any sort of admission by company management, and it is not Evidence of discriminatory intent.

The impact of Darnell's testimony would have been quite prejudicial. "Although it had no direct bearing on the issue to be decided . . . this testimony embellished the circumstantial evidence directed to that issue by adding `smoking gun' type Evidence," the opinion of a company manager. *Schrand v. Federal*

[-6-]

Pac. Elec. Co., 851 F.2d 152, 156 (6th Cir. 1988). Such prejudice substantially outweighs any probative value the proposed testimony might have. The district court Did not abuse its discretion by excluding Darnell's testimony.

III. Slathar contends that the district court erred by not striking a portion of the company's closing argument. Addressing the issue of damages and referring to the testimony of Slathar's expert Varns, the company argued:

[L]adies and gentlemen, you'll recall Mr. Varns stated

Mr. Slathar drew nine to eleven weeks of unemployment compensation. He worked 46 out of the 52 weeks that year, and yet he's drawing unemployment compensation, making $21.00 an hour, 32 to 40 hours a week. Take a look at the exhibit when you get back there. Ladies and gentlemen, that's a fraud against the State.

The district court overruled Slathar's objection to this argument. Slathar now argues that we should grant a new trial because this argument was based on evidence not contained in the record.

"[C]losing arguments are made under the direct control of the trial court. We will not disturb the court's ruling unless an abuse of discretion occurred. To constitute reversible error, statements made in closing argument must be plainly unwarranted and clearly injurious." *P*earce v. Cornerstone Clinic for Women, 938 F.2d 855, 859 (8th Cir. 1991) (citations omitted).

The company's argument addresses both damages and Slathar's credibility as a witness. Both parties argue the substantive issue of whether Slathar violated Minnesota law and actually committed fraud on the state. Whether Slathar committed fraud on the state is certainly not a question for us to Decide here, and it was not an issue for the jury in this age discrimination case. Counsel's

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conclusion that Slathar committed a fraud against the state, in our view, exceeds the bounds of zealous advocacy.

However, the district court instructed the jury several times that statements of counsel were not Evidence in the case. Further, in denying Slathar's motion for a new trial, the court stated that the comment of defense counsel "was clearly not outcome determinative." We cannot conclude that this one sentence in the midst of the entire trial is so egregious as to warrant reversal. See Moses v. Union *P*ac. R.R., 64 F.3d

413, 417 (8th Cir. 1995); (holding that "[a]lthough we strongly disapprove of defense counsel's closing argument, we decline to reverse because plaintiff has failed to make a showing of prejudice").

We affirm the decision of the district court. Because we affirm, we need not reach the issues raised in the company's cross appeal.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

TRIAL COURT'S ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

DONALD A. SLATHAR, 3-93 CIV 256

Plaintiff,

v.

Sathers, Inc.,

Defendant.

This matter comes before the Court upon Donald A. Slathar's motion for a new trial under Rule 59 of the federal rules of Civil Procedures. Slathar argues the court made prejudicial errors in the jury instructions, in failing to admit the testimony of Anita Darnell, and failing to strike defense counsel's comment regarding "fraud on the state of Minnesota."

Rule 59 of the Federal Rules of Civil Procedures allows the trial court to grant a new trial:

> to all or any of the parties and on all or part of the issues ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions in law in the courts of the United States ...

The authority to grant a new trial is "confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 101 S.Ct.

[-1-]

188, 191, 66 L.Ed. 2d 193 (1980); see also *Aimor Elec. Works Ltd. v. Omaha National Bank,* 727 F.2d 688, 692 (8th Cir. 1984).

The Court has reviewed the parties' briefs and believes the jury instructions and rulings during trial were correct and in accord with applicable law. The reasons for the Court's ruling were sufficiently stated during the course of trial. Slathar's single objection to defense counsel's closing argument was not followed with a request for a curative instruction or a motion for a mistrial. Instead, counsel simply awaited the outcome determinative. The case was well tried by able counsel on both sides. There is no reason or legal basis for a new trial.

Based upon a review of the files, records, and proceedings herein, **IT IS ORDERED** That the motion of Plaintiff for a new trial is DENIED.

Dated: March 8, 1995,

_____

Donald D. Alsop, Senior Judge
United States District Court.

[-2-]

EXCERPTS FROM THE
DEPOSITION OF ANITA DARNELL

[Depo. p. 9]

Q. And Pendgraft is Sather's director of human resources basically?

A. I believe that's his title, yes.

Q. [In the phone call to Mr. Pendgraft] ... what was your concern?

A. I felt that because Don was in a protected class both based on his age and his perhaps disability, I though that was a p[retty risky decision to be made.

Q. And what was Mr. Pengraft's response?

A. He Said: I shouldn't be worried about it, that Sather's would take care of it.

[Depo. p. 12]

Q. Do you recall how soon after Mr. Slathar was told that he would be discharge that you called Mr. Pendgraft?

A. I believe it was as soon as I found out.

...

Q To the best you can recall, tell me exactly what you told Mr. Pendgraft.

A. As I Said earlier, when I heard that Don was going to be terminated, I was very concerned based on him being in what I felt was two protected classes, both by age and by disability, and I wanted to make sure that that had been taken into Consideration when tat when that decision was made.

Q. And how long have you been in the human resources personnel function?

A. Probably somewhere in the neighborhood of 18 to 19 years.

Q And I assume that it was because of your experience that you recognized that people can't be discharged because of their age or disability, right?

A. That is correct.

....

Q. What Did you tell Mr. Lindborg [he was the plant manager at the Hopkins, Minnesota facility]?

A. The same thing I told Pendgraft, that I thought it was a very poor decision.

MCDONNELL-DOUGLAS BASED-INSTRUCTIONS: INSTRUCTING THE JURY ON THE DEFENDANT'S PRESUMPTION.

"The progression of age is a universal process. Thus, it is apparent that in the usual case, older workers are constantly moving out of the labor market while younger workers come in. Thus, there is not an automatic presumption of discrimination where a younger worker replaces an older one.

"When an employer's decision is wholly motivated by factors other than age, there is no discrimination. This is even true if the factor motivating the decision to terminate is typically correlated with age; such as pension status, salary, or seniority. The *ADEA* does not make it illegal to terminated an employee simply because he is Paid a high salary.

"An employer is not required to reassign employees whose jobs are eliminated or put employees in a lower echelon, poorer paying jobs with substantial reductions in responsibilities and salary. The issue is ultimately whether the {sic} age

was a determining factor in he decision to discharge the employee, in this case Donald Slathar.

"You are instructed that the focus of your Consideration must be upon Sathers' motivation, and not on your own Consideration of Sathers' business judgment regarding the organization changes that they made. The issue is whether or not Sathers discriminated against Mr. Slathar because of his age." Trans. 778.

INSTRUCTIONS OFFERED BY SLATHAR AND REJECTED BY THE COURT, AFTER THE TRIAL COURT ALLOWED THE MCDONNELL-DOUGLAS PRESUMPTIVE INSTRUCTION FOR THE DEFENSE.

"if you f[ind] Don Slathar's was discharged because of his pay, you may Consider his pay is tied to his experience and age."

From the
MANUAL OF MODEL JURY INSTRUCTIONS, page 72
(dated August 19, 1992)

Your verdict must be fro plaintiff if all the following elements have been proved by the preponderance of the Evidence:

First, defendant [discharged] plaintiff; and

Second, plaintiff's age was a motivating factor in defendant's decision.

If either of the above elements has not been proved by the preponderance of the Evidence, your verdict must be for defendant and you need not proceed further in considering this claim.

96-128

No.

Supreme Court, U.S.
FILED
AUG 22 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DONALD A. SLATHAR,
Petitioner,

v.

SATHER TRUCKING CORPORATION, an Iowa corporation;
SATHERS, INC., a Delaware corporation,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT SATHERS INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the U.S. District Court for the District of Minnesota fairly and adequately instructed the jury as to the substantive law under the Age Discrimination in Employment Act?

2. Whether the U.S. District Court for the District of Minnesota abused its discretion by excluding from evidence the stray remarks of a non-decision maker concerning her opinion regarding the motivation behind the petitioner's termination?

3. Whether compelling reasons exist warranting review by this Court of evidentiary and jury-charge questions in a garden-variety age discrimination case?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the Court whose judgment is sought to be reviewed are contained in the caption of the case in this Honorable Court.[1] Entities related to the Respondent, Sathers Inc., include Sather Trucking Company, an Iowa corporation, and Sather Realty, a Minnesota partnership.

[1] Since Sather Trucking Company was dismissed as a defendant by the trial court, Sathers Inc. is the only Respondent herein.

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OPINIONS BELOW

This case was tried before a jury on January 3, 4, 5, 6, 9 and 10, 1995. A jury verdict was thereafter entered for the Respondent, Sathers Inc. The Petitioner's motion for a new trial was denied on March 9, 1995. A copy of the opinion of the United States District Court for the District of Minnesota denying the motion is contained at pages 10 and 11 of Appendix A to Petitioner's brief. The Petitioner thereafter sought review of the trial court's order in the United States Court of Appeals for the Eighth Circuit, but his petition for rehearing with a suggestion for rehearing en banc was denied on April 25, 1996. A copy of the Opinion of the United States Court of Appeals for the Eighth Circuit is contained at pages 1-9 of Appendix A to Petitioner's Brief.

STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper pursuant to 28 U.S.C. §1254(1). Petitioner seeks the review of a judgment entered by the United States Court of Appeals for the Eighth Circuit on March 15, 1996, and the Court's denial of his petition for rehearing with a suggestion for rehearing en banc on April 25, 1996.

STATUTORY PROVISIONS INVOLVED

Age Discrimination in Employment Act, 29 U.S.C. §623 ("ADEA"):

> It shall be unlawful for an employer -- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

STATEMENT OF THE CASE

Sathers Inc. is a packager, manufacturer, and distributor of candy. It is headquartered in Round Lake, Minnesota. Prior to November 1991, Sathers had packaging and distribution centers in Round Lake, Chattanooga, Tennessee, and Pittston, Pennsylvania. Sathers also had a candy manufacturing plant in New Orleans, Louisiana. (Tr. 276-77, 591-99). In a strategic move to assure a ready supply of product for its packaging and distribution facilities, Sathers purchased the assets of one of its chief suppliers of candy, Powell's, Inc., located in Hopkins, Minnesota. The purchase was consummated in the latter part of November 1991. (Tr. 305).

Upon completion of the sale of Powell's, the management of Sathers made some immediate changes in the Powell's organizational structure. First, Robert Fraser ceased participation in the management of the business.[2] George Fraser and Diane Carlson, Robert Fraser's two children, who were also shareholders in Powell's, were immediately terminated. (Tr. 20, 287). Sathers also immediately began to restructure the remaining organization to bring it more in line with the Sathers business structure. (Tr. 549, 607-08). Ed Lindborg, previously President of Powell's, became the General Manager of Sathers' Powell's Division. (Tr. 408-09). Ed Pyrz, previously Vice President of Operations, became Operations Manager for the Division. (Tr. 437, 444). Petitioner had been listed by Powell's as either Vice-President of Manufacturing or Vice-President of Engineering. (Tr. 12, 66, 427). He was retitled as Plant Engineer. Since Jim Schuller of Sathers was Vice President of Finance, Leslie K. Bruun, Powell's Chief Financial Officer, was relieved of most of his responsibili-

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[2] In his brief, Petitioner relies heavily on the testimony of Robert Fraser regarding Petitioner's performance and worth *to Powell's*. Petitioner's Brief, p. 3. Petitioner's performance at Powell's and Powell's need for his services, however, are not relevant to the issues in this case.

ties. Mr. Bruun was retained to finish-up the financial documents following the sale. Scott Stein, Powell's Vice President of Administration, became an Accountant. Stephen McMichael, previously Vice President of Marketing, became Sales Manager for the Division. (Tr. 550).

Other changes which immediately impacted the former Powell's executive staff were the elimination of company cars, elimination of bonuses, and conversion of all employees from Powell's fringe benefits to those furnished by Sathers. (Tr. 283, 595-96).

After a period of study following this sale, Sathers determined that Powell' s should be restructured in order to bring it in line with Sathers' other operations, to pare duplicative functions, and to eliminate positions which were no longer necessary. This was possible because of the ability of the larger Sathers organization to redistribute work throughout its other operations, thus effecting savings. In fact, Ed Pyrz was asked to assist in the restructuring by designing a new manufacturing organizational structure, which he did. (Tr. 447-50, 615). As a result, Sathers began eliminating certain positions in the executive and salaried ranks. The first change occurred on January 17, 1992. Karen M. Lipinski, an accounts payable clerk, voluntarily left to take another job. Her position was not refilled. (Tr. 550-51). Next, four people were notified on January 31, 1992, that they would be terminated effective March 27, 1992. Those four were Leslie Bruun, formerly Chief Financial Officer of Powell's; Scott Stein, formerly Vice-President of Administration of Powell's; Donald Slathar, Petitioner and formerly Vice-President of Manufacturing/Engineering of Powell's; and Wendy Schriever, a non-executive Computer Operator. (Tr. 439, 447, 550-52, 610-12). *None of these positions were replaced.*

This did not end the reductions and consolidations, however. Ed Lindborg, one of the four people who had a contract of employment with Powell's which was assumed by Sathers, was

terminated in May 1992. (Tr. 409). His position was filled by Ed Pyrz, the Operations Manager. Mr. Pyrz's former position was not filled. (Tr. 466, 617). Stephen McMichael, Powell's Vice President of Marketing, resigned effective May 15, 1992. (Tr. 439). That position was not replaced.

In summary, under the restructured organization, a complete tier of executive level employees was eliminated. Sathers had, after May 1992, a General Manager, Ed Pyrz. (Tr. 437). In the Powell's Division of Sathers, there was no Vice President of Operations, no Vice-President of Manufacturing or Engineering, no Vice-President of Administration, no Chief Financial Officer, and no Vice-President of Marketing. (Tr. 538, 618). To characterize Petitioner's termination as anything other than a restructuring by a purchaser of a business to achieve efficiency in operations is not warranted in this situation.

Donald Slathar was originally employed by Powell's, Inc. in January 1977 as the Plant Engineer. (Tr. 5-6). At the time of the sale, Petitioner was represented as being Vice-President of Manufacturing and/or Vice-President of Engineering. (Tr. 12,66). Throughout the discussions preceding the sale with upper management of Powell's, Petitioner was represented as being an extremely valuable person in the organization because of his engineering skills in designing equipment for use by Powell's in the candy manufacturing operation. (Tr. 398-99, 401, 562,597,603).

During the due diligence process prior to the sale, representatives of Sathers met with Petitioner and discussed his function in the Powell's organization. (Tr. 601-02). In particular, Charles Mayer advised Petitioner of Sathers' philosophy of not designing and building its own equipment, but, rather, of purchasing technology on the open market. (Tr. 482-84, 542-44). The maintenance department at Powell's had previously built equipment in-house to meet its needs. (Tr. 482). Sathers did not plan on continuing this function since it does not design or construct

equipment. Sathers, therefore, did not need to retain an employee in that role. (Tr. 308-09, 612-13, 482-84, 551-52). This particular aspect of Sathers' operation was discussed with Petitioner, who advised both William Bradfield, Chief Operating Officer of Sathers, and Charles Mayer, Vice-President of Operations of Sathers, that his primary function was designing equipment and that Sathers did not need someone in his position. (Tr. 482-84, 542-44, 601-02).

Petitioner attempts to make out a *prima facie* case of age discrimination by comparing himself to Ricky Allan Vos, an employee in his 30's who was transferred into a newly created position of Maintenance General Foreman. Mr. Vos was transferred from Round Lake, Minnesota to the newly purchased Powell's facility in Hopkins, Minnesota in February 1992. (Tr. 481). Mr. Vos had been employed by Sathers for nine years at the time. When first hired by Sathers in 1982, he worked in the capacity of mechanic on plant equipment. (Tr. 478-79). In 1987, he was promoted to maintenance supervisor and transferred to a candy manufacturing plant in New Orleans. (Tr. 478-79). In late 1989, he was promoted to general foreman of production at Round Lake. (Tr. 479-81).

Upon transfer to the Hopkins facility Mr. Vos' title became "Maintenance General Foreman," which carried a $35,000 annual salary. (Tr. 484-85). At the time of trial, Mr. Vos was compensated at $39,000 a year. Mr. Vos has a high school education and has never attended college. (Tr. 477).

Mr. Vos' duties at the Hopkins plant as maintenance general foreman are repair and maintenance, generally "supervising the boiler department, sanitation, building maintenance and also the mechanics." (Tr. 485). This is similar to many of his job duties in New Orleans and Round Lake. (Tr. 479-80, 556). He has not been engaged in designing or constructing equipment for the plant. (Tr. 491-95).

Sathers did not discriminate against Petitioner because of his age. The position held by Petitioner was an executive level position. It was not an executive level position because he acted as a "maintenance foreman"; it was an executive level position because Petitioner was Powell's design and engineering "guru". (Tr. 438-40, 442). That function was eliminated by Sathers. Sathers never viewed Petitioner as a candidate for the maintenance general foreman position. (Tr. 563-66, 616). Had it considered him, however, he would not have been selected. First, to strip him of his executive status and bump him back to an entry level management position would have caused difficulties, as Sathers could not expect that a former Vice President would be satisfied after such a demotion. (Tr. 616). Indeed, such a demotion might have been called a "constructive discharge" by Petitioner. Second, Mr. Vos was well qualified for the general foreman position. He came up through the ranks of the Sathers organization and was familiar with its philosophy and operations. Petitioner was not. Besides, Vos did not replace Petitioner. Ed Pyrz actually assumed Petitioner's executive-level supervisory and decision making responsibilities over the maintenance of the plant, not Vos. (Tr. 447, 614). The general foreman position assumed by Vos was an entirely new, lower-echelon level position.

Finally, one has to consider what the general foreman was worth. Petitioner's W-2 for 1991 was approximately $106,000, including his bonus and other perquisites. (Tr. 17-18). The maintenance general foreman job in the Sathers organization paid $35,000 to start. It would not be realistic to ask an executive employee to take a pay cut of nearly two-thirds his prior year's earnings. However, the pay differential was not the driving factor behind the decision. (Tr. 562). The driving factor was that the primary function of Petitioner's position, which had made him worth a Vice President's salary when employed by Powell's, was Powell's desire to employ a mechanical engineer to design and build equipment. That function was not desired or retained

by Sathers. (Tr. 475). What was needed was a maintenance general foreman to supervise the maintenance department. The essence of Petitioner's job was abolished.

Petitioner points out that Sathers also hired a younger Industrial Engineer following his termination. David Thompson was hired for this position. It is a staff position in which Mr. Thompson works for Charles Mayer. (Tr. 528, 556-57). Mr. Thompson has a Bachelor's degree in industrial engineering, seven years experience in industrial engineering in the Air Force, and a Masters degree in business administration. (Tr. 524-27). His position is titled Operations Engineer, and he works out of Round Lake in all of the Company's facilities. His duties do not include designing equipment. (Tr. 466-67, 528-29, 556-57).

SUMMARY OF ARGUMENT

Petitioner's appeal is directed at technical rulings by the trial judge. He does not contend that the jury verdict is not supported by the evidence. Sathers presented overwhelming evidence that Petitioner's job was eliminated and that he was not replaced in that job.

The ultimate issue in the case is whether Sathers took adverse employment action against Petitioner because of his age. Petitioner's theory throughout the entire case was that he was discharged because of his high salary and experience and that Sathers wanted someone who would work cheaper. That theory was specifically rejected by this Court in *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993).

The trial court correctly instructed the jury on the law regarding intentional age discrimination being the ultimate issue. Sathers was entitled to a business judgment instruction to temper the inherent tendency of a jury to feel sympathy for a discharged employee. The judge did not err in refusing Petitioner's requested instructions because the requested instructions were

adequately covered when he instructed on pretext and because the requested instructions were contrary to *Hazen Paper*.

The testimony of Anita Darnell was properly rejected because she was not in the decision-making loop and had no idea why Slathar was terminated. All she knew was that he was over 40. From this she concluded it had to be age discrimination.

Finally, this case is nothing more than a garden-variety age discrimination case involving a reduction in force. There is no conflict between the decisions rendered in this case and those rendered by this Court or any other lower federal court. Simply, no compelling reasons exist for this Court to review the case.

ARGUMENT

It should be noted from the outset that this garden-variety age discrimination case does not present compelling reasons warranting this Court's review. Rule 10 of the Supreme Court Rules provides that:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . .
>
> . . .
>
> (c) . . . a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Neither of these situations exist. Rather, Petitioner is trying to create compelling reasons for the Court's review where none otherwise exist.

In particular, Petitioner argues that the business judgment instruction given by the trial court is somehow equivalent to instructing the jury regarding the burden-shifting analysis under *McDonnell Douglas* and that the instruction, therefore, contradicts *Hicks* as well as other circuit court decisions holding that the analysis set forth in *McDonnell Douglas* should be preserved for pretrial motions only. As will be discussed more in depth momentarily, no such conflict exists. The trial court clearly instructed as *Hicks* requires, i.e., that the ultimate issue is whether Sathers intentionally discriminated against Petitioner because of his age.

Petitioner also argues that a conflict exists between the lower courts' rulings that Anita Darnell's testimony was properly excluded and decisions from other circuit courts on this issue. As will also be discussed momentarily, no such conflicts exist. All of the cases cited by Petitioner deal with decision-makers and the admissibility of statements made by them. Anita Darnell, however, was not a decision-maker and was not involved in the decision-making process.

Because no conflicts exist and because Petitioner should not be able to create a conflict through some contrived and distorted interpretation of the lower courts' rulings, no compelling reasons exist warranting review by this Court.

I. THE U.S. DISTRICT COURT FAIRLY AND ADEQUATELY INSTRUCTED THE JURY AS TO THE SUBSTANTIVE LAW UNDER THE ADEA.

A. Standard of Review[3]

In reviewing the district court's instructions to the jury, it is well settled that this Court must determine "whether the instructions, taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury." *Kansas City Power & Light v. Ford Motor Credit Co., 995* F.2d 1422, 1430 (8th Cir. 1993). *See also Smith v. World Ins. Co.*, 38 F.3d 1456, 1464 (8th Cir. 1994). It is also well settled that the district court has "broad discretion to instruct the jury in the form and language it considers a fair and adequate presentation of substantive law ..... *[I]t need not give the precise instruction contained in the state's approved instructions or use the language suggested by either party." Id.* at 1429-30. If this

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[3] It should be noted from the outset that Petitioner does not argue that the jury's verdict is not sufficiently supported by the evidence. *Beith v. Nitrogen Products, Inc.*, 7 F.3d 701, 703 (8th Cir. 1993).

Court concludes "that the district court erred in failing to give an instruction, [it] must [then] determine whether the error was prejudicial." *Walker v. AT & T Technologies,* 995 F.2d 846, 849 (8th Cir. 1993).

Petitioner argues that the trial court did not fairly and adequately instruct the jury concerning several issues because the court did not adopt the language he proposed. In particular, Petitioner takes issue with the following instruction, arguing that, despite a recent ruling from the Eighth Circuit to the contrary, it is reversible error for the trial court to give a cautionary instruction regarding an employer's right to make legitimate business decisions:

> The progression of age is a universal process. Thus, it is apparent that in the usual case, older workers are constantly moving out of the labor market while younger workers come in. Thus, there is not an automatic presumption of discrimination where a younger worker replaces an older worker.
>
> The ADEA requires that an employer reach employment decisions without regard to age, but does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group. When an employer's decision is wholly motivated by factors other than age, there is no discrimination. This is true even if the factor motivating the decision to terminate is typically correlated with age; such as pension status, salary or seniority. Thus, the ADEA does not make it illegal to terminate an employee simply because he is paid a high salary.
>
> An employer is not required to reassign employees whose jobs are eliminated or to put employees into lower echelon, poorer paying jobs with substantial reductions in responsibilities and salaries. The issue is

> ultimately whether the age was the determining factor in the decision to discharge the employee.
>
> You are instructed that the focus of your consideration must be on the Defendants' motivation, and not on your own consideration of Sathers Inc.'s business judgment regarding the organizational changes it made. The issue is whether or not Sathers Inc. discriminated against Mr. Slathar because of his age.
>
> To summarize, in order to answer Question 1 of the Special Verdict "YES," it is Mr. Slathar's burden to prove to your satisfaction by a greater weight of the evidence that Sathers Inc. discriminated against him because of his age; that is, that his age was a determining factor in Sathers Inc. 's decision to terminate him.

Petitioner's Appendix A-13. Petitioner argues that the above instruction does not adequately represent the state of the law following this Court's decisions in St. *Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) and *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993). As will be pointed out below, the trial court properly stated the law without prejudicing Petitioner in any way, and the Eighth Circuit properly upheld the trial court's ruling. Moreover, these decisions in no way conflict with any decision from this Court or any other circuit court.

B. The Business Judgment Instruction

Petitioner argues that the giving of the above instruction was prejudicial error requiring a new trial. The heart of his contention is the 1993 U.S. Supreme Court decision of *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S. Ct. 2742, 2749, 125 L. Ed. 2d 407 (1993), which, despite all of the inventive inferences derived from that decision by Petitioner, essentially holds only that the plaintiff always bears the burden of proving *intentional discrimination,* and not simply that the employer's proffered

reason is disbelieved. Petitioner attempts to use *Hicks*, however, to somehow argue that the business judgment instruction given by the trial court equates to the burden-shifting model established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Petitioner's brief, p. 14. Based on this contrived interpretation, Petitioner then argues that the instruction contravenes *Hicks*, as well as cases from other circuits, including *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2612 (1995), a case in which the Seventh Circuit refused to "walk the jury through the paradigm established by *[McDonnell Douglas]*." Rather, the *Gehring* court stated that the *McDonnell Douglas* "burden-shifting model applies to pretrial proceedings, not to the jury's evaluation of evidence at trial." *Id.* In so doing, the trial court in *Gehring* simply refused the plaintiff's request for this specific instruction, opting instead to focus on the ultimate issue of intentional discrimination.

It should also be noted that, with one exception, neither the *Gehring* case nor any of the other cases cited by Petitioner in support of his argument hold that it is reversible error to give a jury instruction embodying the *McDonnell Douglas* burden-shifting analysis.[4] Instead, these cases more aptly stand for the proposition that the jury instructions as a whole should be viewed in an effort to determine whether the jury was adequately instructed on the ultimate issue of whether the defendant discriminated against the plaintiff because of the plaintiff's protected status. This is exactly what the court in this case did. *See Cabrera v. Jakabovitz*, 24 F.3d 372 (2nd Cir.) (while *McDonnell Douglas* instruction can be confusing and need not be given, it

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[4] While the court in *Loeb v. Textron*, 600 F.2d 1003 (lst Cir. 1980) stated that the burden-shifting analysis outlined in *McDonnell Douglas* should not be read to the jury, the First Circuit has not only revisited the issue but has apparently changed its mind, embracing such an instruction in *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 200 (lst Cir. 1987).

was not reversible error to give such an instruction), *cert. denied,* ___ U.S. ___, 115 S. Ct. 205 (1994); *Messina v. Kroblin Transp. Sys., Inc.,* 903 F.2d 1306 (10th Cir. 1990) (giving of *McDonnell Douglas* charge did not warrant reversal because charge directed jury to consider the ultimate issue of intentional discrimination); *Mullen v. Princess Anne Volunteer Fire Co.,* 853 F.2d 1130 (4th Cir. 1988) (while *McDonnell Douglas* does not need to be read to jury, the charge did not warrant reversal); *Cassino v. Reichhold Chemicals, Inc.,* 817 F.2d 1338 (9th Cir. 1987) (trial court did not err by failing to give instruction regarding pretext, even though instruction regarding *prima facie* case under *McDonnell Douglas* was given to jury), *cert. denied,* 484 U.S. 1047 (1988); *Krodel v. Young,* 748 F.2d 701 (D.C. Cir. 1984) *(McDonnell Douglas* analysis used in bench trial), *cert. denied,* 474 U.S. 817 (1985); *Blackwell v. Sun Elec. Corp.,* 696 F.2d 1176 (6th Cir. 1983) (not reversible error where trial court failed to give *McDonnell Douglas* instruction).

Even if there was a split among the circuits as to whether or not the burden-shifting analysis outlined in *McDonnell Douglas* should be read to the jury, any such split would be of no consequence in this case. The business judgment instruction given to the jury in this case in no way embodies the burden-shifting analysis established in *McDonnell Douglas.* Rather, the instruction simply asked the jury to focus "on the Defendants' motivation, and not on [its] own consideration of Sathers Inc.'s business judgment regarding the organizational changes it made. *The issue is whether or not Sathers Inc. discriminated against Mr. Slathar because of his age."* Petitioner's Appendix A-13 (emphasis added). This instruction clearly follows the law as established by this Court in *Hicks.* Besides, *Hicks* did not address either jury instructions or business necessity. What it did was discuss the plaintiff's burden of proof, which explicitly includes both an evaluation of the believability of the employer's articulated reasons and the ultimate issue of intentional discrimination.

Since a jury is necessarily to be instructed on considering whether the employer's reasons are worthy of credence and whether such reasons evidence intentional discrimination, the jury should likewise be instructed that the law mandates that they do not substitute their judgment for the business judgment of the employer. *See Kansas City Power & Light Co., 995* F.2d at 1431 (reading instructions as a whole, an instruction "properly limited the bases for the jury's decision, which is the essential function of jury instructions. "). This is the heart of the instruction which Petitioner attacks.

Furthermore, Petitioner's view that only "substantive issues" be included in jury instructions is without foundation in law or fact. Petitioner argues that the Eighth Circuit was only partially correct in *Walker v. AT & T Technologies, Inc.*, 995 F.2d 846 (8th Cir. 1993),[5] because, while business necessity may be substantive law, it is a question for the court to decide. However, it is the jury which decides the truth or falsity of the employer's reasons and whether they are a pretext, and the jury should be guided by the appropriate legal standard in this task. The trial court in this case did not have the task of assessing the believability or persuasiveness of Sathers' reasons; the jury did. An instruction that the jury is not to replace its own judgment with the employer's speaks directly with how the jury is to deal with issues of intent in this context. *See Houghton v. Sipco, Inc.*, 38 F.3d 953 (8th Cir. 1994) (decided after *Hicks* but recognizing the employer's right to a business judgment instruction); *Ryther v. KARE 11*, 864 F. Supp. 1510 (D. Minn. 1994) (same), *aff'd*, 84 F.3d 1074 (8th Cir. 1996). *Accord Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1166 n.8 (8th Cir. 1985) (recognizing principle that the "ADEA is not intended to be used as a means of reviewing the propriety of a

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[5] *Walker* held that it was prejudicial error requiring a reversal to fail to instruct the jury "on the substantive rule that [the employer] was entitled to exercise its business judgment in making [employment decisions]." 995 F.2d at 850.

business decision on the part of the employer."); *Jorgensen v. Modern Woodmen of America*, 761 F.2d 502, 505 (8th Cir. 1985) (same).

The standard of business judgment set forth by the trial court was the appropriate legal standard. The trial court had wide discretion to instruct the jury on the subjects it felt appropriate. As the legal standard was correct, there was no error in giving this instruction. If there was error, however, it was harmless, as the jury was adequately instructed on intent and pretext.

C. The Jury Instruction Regarding the Consideration of Salary is an Employer's Decision

Petitioner also asserts that the "court's instructions, confused a reasonable jury into thinking that an employer's decision, viewed through common items of circumstantial evidence, such as, age, salary, experience, seniority, or pension status, is not evidence of an illegal motivation," and that the "trial court misapplied *Hazen Paper* . . . ." Petitioner's Brief, p. 16.[6] However, there is no means of legitimately interpreting the trial court's instruction as doing anything other than noting that certain factors *are* typically correlated with age. The court properly informed the jury on the substantive law: "When an employer's decision is *wholly motivated* by factors other than age, there is no discrimination. This is true even if the factor motivating the decision is typically correlated with age; such as pension status, salary or seniority." (R. 79, p. 11) (emphasis added); *Hazen Paper Co.*, 113 S. Ct. 1701.

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[6] It should be noted that, while Petitioner argued at trial that he was terminated because of his high salary, Sathers has never made such an argument. Petitioner's position was eliminated. The elimination had nothing to do with Petitioner's salary. Rather, Petitioner's main job function (designing and constructing equipment) was a function Sathers simply did not utilize in its operations. Thus, Petitioner's interjection of this argument as an issue to be reviewed by this Court is nothing more than an attempt to seek review of the jury's findings of fact — something which does not compel review.

The court did not instruct the jury that such factors were not wrongful (or "illicit"), or that they could not be considered as evidence of age discrimination. The court informed the jury, in line with *Hazen Paper Co.*, that it is not a violation of the ADEA to terminate an employee *"simply* because he is paid a high salary." Taken as a whole, the instruction correctly informed the jury that a decision wholly motivated by a correlative factor is not violative of the ADEA.

In *Thomure v. Phillips Furniture Co.*, 30 F.3d 1020 (8th Cir. 1994), *cert. denied,* ___ U.S. ___, 115 S. Ct. 1255 (1995), the plaintiff alleged that his wage cut was the result of impermissible age discrimination. The employer was faced with severe financial difficulties which necessitated cut backs. Those making the most money received higher percentage reductions. The plaintiff argued that he was a more expensive employee because of his age and that, due to this correlation, the employer's actions were unlawful. The Eighth Circuit disagreed, noting that the plaintiff's "high hourly wage was a function of his job, which required more skill than other warehouse positions, and of his long tenure at [the defendant's]. He was not, as he claims, a more expensive employee by reason of his age. " *Thomure,* 30 F. 3d at 1024. Quoting this Court in *Hazen Paper Co.,* 113 S. Ct. at 1707, the court in *Thomure* went on to note that:

> On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service, . . . and by the same token also is distinct from his wage rate. *Thus [the defendant] could take account of one [salary] while ignoring the other [age], . . . even though there happened to be a correlation between the two in several cases.*

Id. See also Beith v. Nitrogen Products, Inc., 7 F.3d 701, 703 (8th Cir. 1993) (ADEA not meant to prohibit decisions based on factors that sometimes accompany advancing age; simply "because back conditions may be more prevalent in older workers does not alone make the decision an age-based decision."); *Allen v. Diebold, Inc.*, 33 F.3d 674 (6th Cir. 1994) (same); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1166-7 (8th Cir. 1985) (rejecting argument that heart condition correlated with age and that termination because of heart condition equates to age discrimination).

Just as high salary can be taken into account while ignoring age, experience is also conceptually distinct from age. Petitioner's argument in this case *presumes* that a decision based on experience is necessarily age-based. This argument was flatly rejected in *Schibursky v. IBM*, 820 F. Supp. 1169, 1177 (D. Minn. 1993), where the court held, despite the above argument, that:

> The firing of an employee to save salary costs resulting from seniority . . . does not violate the ADEA. Even if older employees of IBM are more likely to have more years of service than younger employees, IBM's alleged decision to fire [the Petitioner] because of her years of service is not discriminatory treatment on the basis of age.

(Citing *Hazen Paper Co.*, 113 S. Ct. at 1705-07).

That the court did not *affirmatively instruct* that salary could be evidence of age discrimination is not the standard on review of jury instructions. No party is entitled to specific or special language. *See Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2612 (1995). The district court accurately stated the law under *Hazen Paper Co.* Furthermore, the court explained early in the jury instructions what constituted evidence. (R. 79, p. 3.) It does not thereafter have to affirmatively inform the jury of each piece of evidence brought forth at trial which it may consider.

II. THE U.S. DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING FROM EVIDENCE THE STRAY REMARKS OF A NON-DECISION MAKER CONCERNING HER OPINION REGARDING THE MOTIVATION BEHIND PETITIONER'S TERMINATION SINCE THE WITNESS WAS NEITHER CONSULTED ABOUT NOR PARTICIPATED IN THE DECISION.

A. Standard of Review

The admission of evidence is a matter for the district court's discretion and should be deferred to by this Court absent an abuse of discretion. *Morgan v. Arkansas Gazette,* 897 F.2d 945, 962 (8th Cir. 1990). *See also Tolan v. Levi Strauss & Co.,* 867 F.2d 467 (8th Cir. 1989). In this instance, the trial court did not abuse its discretion in excluding stray remarks and opinion testimony of a non-decision maker.

B. Anita Darnell's Testimony was Properly Excluded

At trial, Petitioner sought to introduce the testimony of Anita Darnell, Powell's former Human Resources Manager, that once she heard Petitioner was to be laid off she became concerned due to the fact that Petitioner was in the protected age group.[7] She

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[7] Petitioner implies that Ms. Darnell would have testified that "the representation that Mr. Donald Slathar's position as eliminated was highly questionable, since the services he performed were needed within the plant." Petitioner's Brief, p. 5. Such implication by Petitioner is extremely misleading, especially since it is not supported by the record. *See* Respondent's Appendix 2-4. Ms. Darnell never opined regarding the alleged need for Petitioner's services. Rather, Ms. Darnell only stated what every good personnel manager knows — if you have someone in a protected class who gets terminated, he or she may bring a charge of discrimination against you, even if there are no facts to support such charge.

admittedly, however, did not have any involvement in the decision to terminate Petitioner, and, at the time she became concerned, there was no indication of who would be performing certain of Petitioner's former duties. In fact, Ms. Darnell did not find out about Petitioner's termination until after the decision was made and *after* Petitioner was notified of the decision. (Tr. 224-33).

Perhaps the most basic of requirements of admissibility is that evidence be relevant. "Relevant evidence" is defined in Fed.R.Evid. 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Fed.R.Evid. 401. In *Beshears v. Asbill,* 930 F.2d 1348 (8th Cir. 1991), the Eighth Circuit delineated the type of evidence of alleged discriminatory animus which will support an inference that an illegitimate basis was a motivating factor in the employment decision at issue. In particular, the court distinguished "[c]omments which demonstrate a discriminatory animus in the decisional process or those uttered by individuals closely involved in employment decisions," from "stray remarks in the workplace, statements by nondecision-makers, or statements by decision-makers unrelated to the decisional process." *Id.* at 1354 (quoting *Price Waterhouse v. Hopkins,* 490 U.S. 228, 277-8, 109 S. Ct. 1775, 1804-05, 104 L. Ed. 2d 268 (1989)). While evidence of the former type of remark might be sufficient to support an inference that an illegitimate motive was a motivating factor in the employment decision, the latter was rejected as insufficient. *Id. See also Bashara v. Black Hills Corp.,* 26 F.3d 820, 824 (8th Cir. 1994) (statement by non-decision maker similar to Ms. Darnell's proffered testimony deemed "the functional equivalent of a stray remark that we have said does not constitute evidence of discriminatory animus"); *Hermeling v. Montgomery Ward & Co.,* 851 F. Supp. 1369 (D. Minn. 1994) (actions and comments by non-decision makers cannot provide a basis for a discrimination charge).

Another significant hurdle which evidence must surpass in order to be admissible is the requirement that:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter . . . .

Fed.R.Evid. 602. This rule "prohibits the admission of testimony concerning matters the witness did not observe or had no opportunity to observe." *United States v. Oliver,* 908 F.2d 260, 263 (8th Cir. 1990) (quoting *United States v. Lyon,* 567 F.2d 777, 783-84 (8th Cir. 1977), *cert. denied,* 435 U.S. 918 (1978)). Ms. Darnell's rejected testimony did nothing more than attempt to create evidence of discriminatory intent by offering conclusions concerning the motivations of the decision-makers without the benefit of personal knowledge and observation. It was, therefore, properly excluded under Rule 602.

Ms. Darnell' s rejected testimony is also governed by the following dual requirements:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Fed.R.Evid. 701. On this issue, the Eighth Circuit adopted the Seventh Circuit's reasoning that:

> [I]n order to conclude that [lay opinion] testimony is admissible, the court must find that the witness' testimony is based upon his or her personal observation and recollection of concrete facts ..., and that those facts cannot be described in sufficient detail to adequately convey to the jury the substance of the testimony.

Wactor v. Spartan Transp. Corp., 27 F.3d 347, 350 (8th Cir. 1994) (citing *Krueger v. State Farm Mut. Auto. Ins. Co.*, 707 F.2d 312, 317 (8th Cir. 1983)). The opinion of Ms. Darnell is based solely upon her personal assessment of the circumstances surrounding Petitioner' s termination and the sole fact that Petitioner was within the protected age group when he was terminated. Significantly, *she had no involvement in the decision-making process which resulted in Petitioner's termination, and she does not claim to have been told by any of the decision-makers that Petitioner was terminated due to his age.* Moreover, her opinion is in no way helpful to the determination of any fact in issue, particularly the ultimate issue of the existence of intentional discrimination, given the fact that it is based on the same circumstantial evidence that was presented to the jury and upon which that body formed its own collective conclusion. Ultimately, her testimony is nothing more than mere speculation, not unlike that which failed to constitute competent evidence in *Schibursky v. IBM*, 820 F. Supp. 1169, 1178 (D. Minn. 1993); *see also Crimm v. Missouri-Pacific RR Co.*, 750 F.2d 703, 710 (8th Cir. 1984) (court properly refused to permit superintendent's witness to testify that he believed superintendent's age was factor in his termination where witness was not a decision-maker); *Nelson v. J. C. Penney Co., Inc.*, 75 F.3d 343, 346 (8th Cir. 1996) (fact that manager knew plaintiff's age could *not* "furnish the basis for a reasonable inference that his age was a basis for his termination), *petition for cert. filed*, 64 U.S.L.W. 3795 (U.S. May 20, 1996) (No. 95-1878). A fact finder may not simply convert a condition that is necessary for a finding of liability (here, knowledge of a plaintiff's age) into one that is sufficient for such a finding.

Even if the deposition evidence described above is determined to be relevant to the determination of this action, all of it —

> may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confu-

> sion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed.R.Evid. 403. The Notes of the Advisory Committee elaborate that "'[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

In *Schrand v. Federal Pacific Electric Company,* 851 F.2d 152 (6th Cir. 1988), the Sixth Circuit applied this rule in an age discrimination case to exclude evidence of alleged discrimination involving other employees. Specifically, the court explained:

> With no other direct evidence of age discrimination in the case, the impact of the two former employees' testimony would be great. Thus, even if that evidence was relevant, we believe its probative value was substantially outweighed by the danger of unfair prejudice flowing from its admission. Although it had no bearing on the issue to be decided — whether Schrand was discharged because of his age— this testimony embellished the circumstantial evidence directed to that issue by adding "smoking gun" type evidence. It offered an emotional element that was otherwise lacking as a basis for a verdict in Schrand's favor. See Notes of Advisory Committee to Rule 403.
>
> In addition to creating prejudice which substantially outweighed its probative value, the testimony tended to confuse the issue by focusing the [factfinder's] attention on two totally unrelated events, a consideration under Rule 403. If the [factfinder] was convinced that the testimony of Owens and Dolan was truthful, there was a distinct danger that [it] would assume a connection which was never proven between the termination of the two witnesses and that of Schrand.

Schrand, 851 F.2d at 156. *See also Haskell v. Kaman Corp.*, 743 F.2d 113 (7th Cir. 1984); *Kier v. Commercial Union Ins. Co.*, 808 F.2d 1254 (7th Cir. 1987), *cert. denied*, 481 U.S. 1029 (1987); *Mauter v. Hardy Corp.*, 825 F.2d 1554 (11th Cir. 1987). The above case law supports the trial court's exclusion of Anita Darnell's testimony. The court, therefore, did not abuse its discretion in refusing to admit the stray remarks and unsupported opinion testimony.

Petitioner argues that the trial court's exclusion of Anita Darnell's testimony conflicts with decisions from other circuits. In particular, Petitioner points to decisions from the Second, Third, Sixth and Eighth Circuits.[8] A review of these decisions, however, shows that Petitioner's assertion is, once again, incorrect. In every decision cited by Petitioner, the evidence necessary to prove age discrimination consisted of, at least in part, discriminatory statements by individuals involved in the decision-making process. *Sutera v. Schering Corp.*, 73 F.3d 13, 16 (2nd Cir. 1995) (plaintiff submitted evidence that, among other things, *his supervisor* "made harassing and demeaning references to his age."); *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 333 (3rd Cir. 1995) (evidence of remarks by *Chief Executive Officer* of company constituted circumstantial evidence of discrimination); *Wells v. New Cherokee Corp.*, 58 F.3d 233, 238 (6th Cir. 1995) (consideration given to statement of supervisor "meaningfully involved in the decision to terminate an employee.") *Accord Nelson v. J.C. Penney Co., Inc.*, 75 F.3d 343, 345 (8th Cir. 1996) (recognizing that "statements by persons involved in the decision making process . . . may be viewed as directly reflecting [discrimination].") Anita Darnell, however,

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[8] Petitioner also argues that the exclusion of Ms. Darnell's testimony conflicts with *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). *Meritor*, however, did not address the issue at hand. Rather, it dealt with the issue of an employer's liability in sexual harassment cases.

never participated in the decision to terminate Petitioner. In fact, she was not informed until *after* the decision was made. Thus, there is no conflict between the decision in this case and the decisions of other courts.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

File No: 3-93 Civil 256

Donald A. Slather,
Plaintiff,

vs.

Sather Trucking Corporation,
an Iowa corporation;
Sather's Inc., a Delaware corporation,
Defendants.

The Deposition of ANITA DARNELL, taken pursuant to Notice of Taking Deposition, taken before Kerri L Brodock, a Notary Public in and for the County of Hennepin, State of Minnesota, taken on the 14th day of April, 1994, at 2000 Metropolitan Centre, 333 South Seventh Street, Minneapolis, Minnesota, commencing at approximately 1:00 p.m.

* * *

[8]

A. I think so.

Q. How many mechanics did Powell's employ?

A. I'd say approximately 10 to 15 perhaps.

Q. Was it a three shift operation?

A. Production was two shift [sic] but the plant was three shifts

Q. Okay. Were they three eight-hour shifts or how were they structured?

A. They were 10-hour shifts with sanitation or the third shift working odd hours.

Q. What position did Bob Fraser hold with Powell's when you were there?

A. I believe Bob was the chairman.

Q. Was he at the plant every day?

A. Pretty much.

Q. Did you have any participation in the decision to terminate Mr. Slather?

A. No, sir.

Q. Were you consulted in any fashion by managers of Sather's?

A. Prior to the decision being made, no.

Q. Were you consulted about it after the decision was made?

A. Can you rephrase that?

Q. Well, I asked if you were consulted by [9] management of Sather's about their decision and you said prior to the decision being made, no, so the follow-up is how about after the decision?

A. I had a conversation with Doug Pengraft about the decision.

Q. When did that take place, do you remember?

A. It was after the decision had been made, but I don't recall exactly when it was.

Q. Was Mr. Slather still at the plant?

A. Yes.

Q. And Mr. Pengraft is Sather's director of human resources basically?

A. I believe that's his title, yes.

Q. Where did this — was it a personal, face-to-face conference?

A. It was a phone call.

Q. Phone call?

A. Uh-huh.

Q. Did you call him or did he call you?

A. I think I called him.

Q. What was the purpose of the phone call?

A. I was concerned about that decision.

Q. And what was your concern?

A. I felt that because Don was in a protected class both based on his age and his perhaps disability, I **[10]** thought that was a pretty risky decision to be made.

Q. And what was Mr. Pengraft's response?

A. He said I shouldn't be worried about it, that Sather's would take care of it.

Q. What disability did Mr. Slather have?

A. I believe he's hearing impaired.

Q. Did you hear anybody in Sather's management ever reference Mr. Slather's age?

A. Other than in my conversation with Pengraft, I don't think I talked to anybody about Mr. Slather from Sather's.

Q. What I'm getting at, did you hear anybody in Sather's say, "We're going to fire him because he's too old?"

A. No.

Q. Because he's hearing impaired?

A. No.

Q. Did you ever prepare any written reports concerning your concerns about the termination of Mr. Slather?

A. I don't recall if I did or not.

Q. Did you ever speak to Mr. Bradfield about your concerns about Mr. Slather's termination?

A. No.

Q. Did you discuss any concerns about the

* * *

[12]

Q. Do your recall how soon after Mr. Slather was told that he would be discharged that you called Mr. Pengraft?

A. I believe it was as soon as I found out.

Q. Do you remember how Mr. Slather was notified of his pending discharge or impending discharge?

A. I believe he was told by Ed Lindborg.

Q. Do you remember him getting a letter telling him that he would be discharged?

A. No.

Q. To the best of your recollection, it would be shortly after that that you called Mr. Pengraft?

A. I believe that's true.

Q. To the best you can recall, tell me exactly what you told Mr. Pengraft?

A. As I said earlier, when I heard that Don was going to be terminated, I was very concerned based on him being in what I felt were two protected classes, both by age and by disability, and I wanted to make sure that that had been taken into consideration when that decision was made.

Q. And how long have you been in the human resources personnel function?

A. Probably somewhere in the neighborhood of 18 or 19 years.

Q. And I assume that it was because of your

* * *